Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1229

GERALD N. KLAUBER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner, Gerald N. Klauber, respectfully moves this Court to issue a Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on November 29, 1979.

OPINION BELOW

The Opinion of the Court of Appeals, upon Petitioner's appeal from conviction, is not yet published and is attached hereto as Appendix A.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on November 29, 1979. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court's refusal to require the Government to seek immunity for a critical defense witness, where the Government had previously conferred immunity upon that witness to compel his testimony before the Grand Jury, violates Petitioner's right to due process.

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

> No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .

Federal Mail Fraud Statute — U.S.C. § 1341:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, . . . shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Organized Crime Control Act of 1970, Racketeer Influenced and Corrupt Organizations, 18 U.S.C. §§ 1961, et seq.

§ 1961 Definitions.

As used in this chapter—

(1) "Racketeering activity" means . . . (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud) . . .

(5) "Pattern of racketerring activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

* * * * * *

§ 1962. Prohibited activities.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

* * * * * *

§ 1963. Criminal penalties.

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000, or imprisoned not more than twenty years, or both, and shall forfeit to the United States (i) any interest

he has acquired or maintained in violation of section 1962, and (ii) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in conduct of, in violation of section 1962.

Federal Immunity Statute — 18 U.S.C. § 6001, et seq.

§ 6001 Definitions

As used in this part—

(2) "other information" includes any book, paper, document, record, recording, or other material.

(4) "court of the United States" means any of the following courts: . . . a United States district court established under chapter 5, title 28, United States Code, . . .

§ 6002. Immunity generally.

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States;

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other

information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

§ 6003. Court and grand jury proceedings.

(a) In the case of any individual who has to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest, and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

Federal Rules of Evidence — Rule 804 Hearsay Exceptions; Declarant Unavailable

Rule 804(a). Definition of Unavailability.

"Unavailability as a witness" includes situations in which the declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; . . .

Rule 804(b). Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

STATEMENT OF THE CASE

On December 1, 1977, Petitioner Gerald N. Klauber, a Baltimore, Maryland attorney, was indicted, along with his law partner, Howard Fine, on twenty seven (27) counts of mail fraud and one count of racketeering, pursuant to 18 U.S.C. § 1341 and 18 U.S.C. § 1962, respectively. These charges arose from an investigation of inflated and false claims allegedly submitted to insurance companies for personal injuries resulting from automobile accidents.

Prior to the commencement of trial on March 27, 1978, the Government agreed to a severance of the two defendants and nolle prossed counts 1, 6, 15, 16, 17, 18, 19, 20, 25, and 26. By agreement trial then proceeded with Petitioner as the sole defendant, the Honorable Alexander Harvey, II, presiding. The trial lasted approximately four weeks, and, on April 21, the jury returned a verdict of guilty as to the remaining mail fraud counts and the single racketeering count. The jury also made a special finding, for the purposes of forfeiture, that Petitioner's interest in the law firm of Fine and Klauber, P.A., was forty-nine percent (49%).

Petitioner was sentenced to five years imprisonment on each count, all sentences to run concurrently. This conviction was affirmed in the United States Court of Appeals for the Fourth Circuit on November 29, 1979. Petitioner then filed a timely Petition for Rehearing With Suggestion for Rehearing Before Fully Constituted Court In Banc. The Petition for Rehearing was denied on January 9, 1980.[1] On January 30, 1980, Mr. Klauber reported to the designated federal institution to commence his incarceration.

The essence of the alleged scheme to defraud was that Petitioner, in representation of automobile accident victims, submitted false and fraudulent medical reports and bills to the insurers of the persons purportedly liable for the accidents, in an effort to obtain larger settlements.

At trial, the Government presented testimony of representatives of the various insurance companies alleged to have been defrauded. These witnesses testified that Petitioner had provided them with claimants' medical bills and reports and that the claims were settled in reliance on those bills and reports.

Also called as prosecution witnesses were a group of Petitioner's present and former clients, these witnesses testifying that they had been injured in automobile accidents and that Petitioner had represented them and settled their claims. With respect to the medical reports and bills, most of the clients were unable to recall the exact number of times they had visited the treating physician or had been scheduled for appointments which they did not keep. Several stated, however, that they had not received the number of treatments reflected by the bill.

The Government presented the testimony of several physicians, all of whom had previously been convicted of

[1] The Order and Corrected Order denying the Petition for Rehearing are re-printed as Appendices B and C, respectively.

mail fraud, and each of whom had agreed to cooperate with the Government. However, only one of these medical practitioners, Melvin Sobkov, a chiropractor, was able to provide any direct evidence of fraudulent intent on Petitioner's part. Dr. Sobkov testified that he had inflated some bills at his own initiative and some at the attorney's initiative. With regard to this latter class, Dr. Sobkov could not recall any specific request for an inflated bill from Petitioner with the possible exception of the bill relative to client Paul Craig (Count 23). Dr. Sobkov also testified that he had had several conversations with Fine and Klauber associates, particularly Michael Simons, Esquire, regarding bill inflating.

Finally, the Government elicited testimony from a Government immunized witness, Roger Powell, formerly an associate at Petitioner's law firm, which attributed to Petitioner the destruction of law firm documents in order to thwart the federal investigation. The Government then sought and received an instruction that if the jury found that Petitioner was responsible for the destruction of those files and if such action was taken to hinder the federal probe, then the jury could find criminal intent from that action.

At the core of Petitioner's defense was his claim of good faith and lack of criminal intent. Accordingly, the defense case consisted of essentially two prongs: (1) witnesses called to establish circumstantially that whatever excesses may have occurred, occurred without the knowledge or approval of Petitioner; and (2) a direct denial by Mr. Klauber himself. With regard to the first prong, and in an attempt to rebut the testimony of the immunized witness Roger Powell, the defense attempted to call Michael Simons, another Fine and Klauber associate, as a witness. The Government had previously immunized Simons pursuant to 18 U.S.C. 6001-6003[2] in order to gain his Grand

[2] This code section is re-printed in full, *infra*, at p. 4-5.

Jury testimony. The Government, however, did not call Simons as a witness at trial, nor did the Government make Simons' Grand Jury testimony available to Petitioner.

Simons, through his counsel, indicated that, absent a continuation of the previously conferred immunity and/or new grant of immunity, Simons would invoke his privilege against self-incrimination when called as a witness. Petitioner proffered to the trial court that Simons, if able to testify, would say that Simons alone was responsible for the destruction of files; that that action was simply routine housekeeping; and that, in any event, the actions were taken without Petitioner's knowledge or approval. It was further proffered that Simons would unequivocally deny any conversations with Dr. Sobkov in which he urged Dr. Sobkov to inflate medical bills.

Petitioner then requested that the trial court require the Government to continue the previously conferred immunity or require the Government to provide a new grant of immunity to permit Simons to testify.[3] The trial court refused to so order, and Petitioner was thereby denied the benefit of exculpatory evidence on an issue of central importance at trial.

REASON FOR GRANTING THE WRIT

I.

THE ISSUE OF DEFENSE WITNESS IMMUNITY IS ONE OF THE MOST SIGNIFICANT QUESTIONS EMERGING IN THE SPHERE OF FEDERAL CRIMINAL PROCEDURE AND REQUIRES GUIDANCE FROM THIS COURT.

The issue which Petitioner presented for review before the Court of Appeals, and the issue upon which the instant Petition is based, involves when, and under what circum-

[3] On appeal to the United States Court of Appeals for the Fourth Circuit, the Government conceded at oral argument that the immunity conferred for the purposes of obtaining the Grand Jury testimony did not provide protection for the witness at trial absent a new immunity order.

stances, the refusal of the Government to seek use-immunity for a critical defense witness, particularly where the Government had previously immunized that witness to secure his Grand Jury testimony, violates an accused's right to due process. Given that this issue is one which is emerging with increasing frequency among the various circuits, and given the substantial and recurring nature of this question, Petitioner suggests that this matter is ripe for and worthy of review by this Court.

The authority to confer immunity is primarily statutory. Eighteen U.S.C. §§ 6001-6003 provides that, in the face of a witness' valid claim of Fifth Amendment privilege, in order to compel the testimony of that witness, the United States Attorney or his designated representative may apply to the appropriate United States District Judge for an order granting that witness use-immunity for the purposes of that selected proceeding.[4] While the Court must approve the grant of immunity, it is now well established that the decision to seek immunity normally rests within the discretion of the United States Attorney's Office, see *United States v. Housand,* 550 F.2d 818, 824 (2nd Cir.), *cert. denied* 431 U.S. 970 (1977); *Thompson v. Garrison,* 516 F.2d 986 (4th Cir.), *cert. denied* 423 U.S. 933 (1975); and *In re Kilgo,* 484 F.2d 1215, 1219 (4th Cir. 1973).

By the express language of 18 U.S.C. § 6003(b)(1), the standard by which the discretion to confer immunity is exercised turns on whether

> [t]he testimony or other information from such individual may be necessary to the public interest.

This test implies that in assessing the need for immunity in any particular case, there must, by necessity, be a

[4] In accordance with *Kastigar v. United States,* 406 U.S. 441 (1972), the granting of use-immunity, as opposed to transactional immunity, satisfies the constitutional prohibition against compelled self-incrimination.

balancing between the need for prosecuting wrongdoers and the need for securing testimony. In that regard, there developed a general principle prohibiting defense witness immunity. This principle is founded upon the recognition that society suffers when the guilty escape punishment, *In re Kilgo,* 484 F.2d at 1222, and that one defendant should not be permitted to confer "an immunity bath" upon his confederates. *Id.* It is this rationale which is the underpining of the general refusal to grant defense witness immunity.

Counterposed to this general principle exists a growing body of case law recognizing that, in certain situations, the failure to afford defense witness immunity violates due process. Among those factors identified as triggering a right to defense witness immunity include the Government's own reliance upon immunized testimony, see *United States v. Earl,* 361 F.2d 531, 534 n.1 (D.C. Cir., 1966); *United States v. Bautista,* 509 F.2d 675, 677 (9th Cir.), *cert. denied* 421 U.S. 976 (1975); and *United States v. Ramsey,* 503 F.2d 524 (7th Cir. 1974), *cert. denied* 420 U.S. 932 (1975); the existence of prosecutional misconduct, *United States v. Morrison,* 535 F.2d 223, 229 (3rd Cir. 1976); and the Government's selective use of immunity to bolster its own case while inhibiting the defense case, *United States v. DePalma,* 476 F. Supp. 775 (S.D.N.Y. 1979). In essence, when all of the factors taken together, lead to the conclusion that the criminal accused "was denied a fair trial because of the Government's refusal to seek immunity for defense witnesses", then that failure to obtain defense witness immunity constitutes a violation of due process. *United States v. Alessio,* 528 F.2d 1079, 1082 (9th Cir.) *cert. denied* 426 U.S. 948 (1976).

In the instant case, the Government relied upon the testimony of one immunized witness, Roger Powell.[5]

[5] Although Powell did not have immunity pursuant to 18 U.S.C. § 6001, *et seq.,* he did testify under "letter immunity". The Court of Appeals held, however, that for the purposes of this case, no

Further, virtually all of the medical witnesses, including Melvin Sobkov, testified pursuant to agreements by which the witness would provide testimony, and the Government would bring "the cooperation" to the attention of the court for the purposes of sentence reduction. See, Brief of Appellant, *United States v. Klauber,* Case No. 78-5169, United States Court of Appeals for the Fourth Circuit, p. 9 n.8, and *United States v. DePalma,* 476 F. Supp. at 779.

The gist of Powell's testimony was that he had seen Simons destroy old Fine and Klauber files in order to thwart the federal investigation, the implication being that Simons acted with the approval of Petitioner. This testimony was used by the Government to justify an instruction to the jury that destruction of those files, if done to block the investigation, could be considered as evidence of Petitioner's criminal intent. Ironically, it was this very evidence which Petitioner sought to refute through Simons, and it was this very testimony which could be elicited if and only if Simons were immunized at trial. Hence, the instant case dramatically highlights the unfairness in the Government's reliance upon and selective use of immunity to enhance its own case while denying to the defense that very procedural mechanism by which exculpatory evidence could be placed before the jury.

The opinion of the Court of Appeals in the instant case attributes to Petitioner the position that the immunity for Powell and/or the prior grant of immunity to Simons triggered a *per se* reciprocal defense right. Petitioner's argument, however, is not so autonomic. The grant of immunity to Powell is significant in that it has been recognized as one of the special factors to be considered in assessing a defense witness immunity claim. See *United States v. DePalma,* 776 F. Supp. at 776. Moreover, and of

significant distinction exists between the formal and informal types of immunity. See Opinion at A.

overwhelming importance, is that the prior Simons immunity sets this case far above any precedent in two highly significant ways. First, the prior grant of immunity is evidence that the Government had already implemented the balancing process referred to above. By the prior immunity grant, the Government expressly recognized that society's interest in possibly prosecuting Simons was outweighed by the need to secure information from him. Consequently, at trial, Petitioner simply sought to rely on the balancing previously implemented by the Government.

Secondly, the fact of prior immunity absolutely dispels any possibility that Petitioner can be accused of, or accomplish, the immunization of a confederate. The foundational principle justifying the general refusal to grant defense witness immunity — the avoidance of an "immunity bath" — is utterly and completely vitiated. Consequently, in the instant case, there is simply no reason for the Government to refuse defense witness immunity except for the presumed tactical advantage in suppressing the procedural mechanism by which evidence favorable to the accused could be placed before the jury.[6]

The instant case presents a highly sophisticated issue which is worthy of full review by this Court. Against the backdrop of a general prohibition against defense witness

[6] Notwithstanding a suggestion in the opinion of the Court of Appeals that Simons' testimony would have been cumulative, see Opinion at BA, the Simons proffer was directed to what emerged at trial as a hotly contested issue — the destruction of evidence. Simons himself was the person who allegedly committed the acts; he was the person who could testify most concretely concerning those facts and circumstances; and no other witness could speak to this matter. While the defense did call several witnesses who testified as to Powell's poor reputation for throuthfulness, a generalized attack on the veracity of a witness does not make cumulative, testimony concerning the substantive points testified to by the impeached witness.

immunity, there is an ever developing doctrine recognizing and ratifying the principle that due process demands that, in some instances, exceptions be carved out from that general rule. Given that Simons' prior immunity totally undercuts the entire rationale for maintaining the prohibition, the instant case presents the most radical set of circumstances of any case to date. Accordingly, this case illustrates the issue in a fully crystallized and developed context such that this case presents itself as an opportune vehicle for a clear and definitive explication.

The issue of defense witness immunity is one of supreme importance throughout the federal sphere. As vigorous prosecutors rely more and more upon the federal immunity statute, the unfairness which is sometimes a by-product of that immunity mechanism appears with increasing frequency. As a result, the federal decisions are producing a haphazard and not always reconcilable body of law. Were the issue of defense witness immunity simply one more hypertechnicality, the need for review by this Court may well be less compelling. The issue, however, is not merely technical; rather it has, at its roots, principles protective of insuring that all relevant evidence be revealed at trial before the finding of criminal responsibility. In short, this case presents an issue which is fundamental to the integrity of the fact-finding process, and consequently, requires review by the Court.

II.

THE INSTANT CASE MERITS REVIEW IN THAT THE COURT OF APPEALS DECIDED THE ISSUE ON POINTS NEITHER BRIEFED NOR ARGUED BY THE PARTIES.

The Opinion of the Court of Appeals holds that the availability of Simons grand jury testimony precludes the right to compel the Government to seek defense witness immunity. See Opinion at 5A-9A.

The Opinion suggests that since the relevant portions of Simons' grand jury testimony may have been admissible under Federal Rule of Evidence 804(b)(1),[7] the former testimony hearsay exception, this "less radical route" stands as an acceptable alternative thereby precluding a legitimate claim for defense witness immunity. Since the direct introduction of the transcripts avoids the necessity of reaching the issue of defense witness immunity, the Court concludes that the failure to pursue that avenue is dispositive of the entire question.

In reaching it's decision, the Court's analysis was significantly flawed for a variety of reasons. First, the argument fails to recognize that for the integrity of the fact-finding process, hearsay, even admissible hearsay, is inherently less reliable and correspondingly less desirable than non-hearsay. Moreover, this disfavor is heightened to the extent that the argument is founded on a hearsay exception for which the unavailability of the declarant is required before resorting to such evidence is permitted. Second, the argument fails to recognize the basic unfairness in requiring a criminal accused, in the course of defending himself at trial, to rely on "second class" evidence where he has an opportunity to obtain a more reliable and convincing source.

More importantly, however, the Court's logic is circular, first making an assumption and then using that assumption to build a *post hoc* justification for that assumption. In order to invoke Rule 804(b)(1), it is, of course, an absolute prerequisite that the hearsay declarant be unavailable, and there is no dispute that a valid claim of privilege

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[7] The Opinion also suggests that Rules 803(24) or 804(b)(5), the general hearsay exceptions, could also justify direct admission of the transcripts. In so suggesting however, the Opinion stands in direct opposition to *United States v. DePalma, supra.*, which summarily dismissed such an argument. 476 F. Supp. at 776 n.4. See, also the discussion *infra.* at 17-19.

supports a finding of unavailability. See Rule 804(a)(1). It is equally as clear, however, that an immunized witness is not unavailable within the meaning of 804(a)(1). In reaching its conclusion that the circumstances of the instant case afford no right to defense witness immunity, the Court makes the necessary initial assumption that Simons is unavailable. By so assuming, the Court then concludes that his grand jury testimony may well be admissible under 804(b)(1). However, it is the initial question — whether the witness is or is not unavailable — which is the very issue Petitioner presented for review by the Court. For the Court to rest its decision on the belief that the grand jury testimony of an unavailable declarant would provide an acceptable route for introduction of the sought after testimony, simply begs the threshold question of whether the declarant is, in fact, unavailable. In short, by assuming that there is no defense witness immunity, the declarant Simons becomes unavailable, thus, triggering the right to rely on 804(b)(1). Since 804(b)(1) can then justify a "less radical" foundation for admission of the testimony, the issue of defense witness immunity, i.e., the declarant's "availability" is not reached.

Consequently, to the question of whether Petitioner has a right to defense witness immunity, the Court of Appeals first assumed that the answer is no, and then, upon that assumption, built an analysis to justify that assumption. By creating this analytic construct, the Court avoided addressing the initial question as to whether Simons was available or unavailable, and in so doing, avoided squarely addressing the very point Petitioner presented for review.

Petitioner submits that the Opinion of the Court of Appeals, resting as it does on the above hearsay analysis, is fundamentally flawed and can be corrected only by this Court. This analytic flaw, however, is particularly egregious in that the Court relied upon an argument neither

raised, briefed, nor argued by the parties at any stage of the proceedings. Consequently, the Opinion represents an attempt to resolve a sophisticated and complex legal problem, a problem which has very dramatic and concrete consequences for Petitioner without the imput or participation of the parties to the dispute.[8]

III.

THE OPINION OF THE COURT OF APPEALS IN THE INSTANT CASE IS INCONSISTENT WITH DECISIONS OF OTHER FEDERAL COURTS AND REVIEW BY THIS COURT IS NECESSARY TO RESOLVE THE CONTRADICTIONS.

The Opinion of the Court of Appeals in the instant case is directly contradictory to the decision in *United States v. DePalma, supra*. In *DePalma,* the court faced a situation in which the Government, in pursuing a securities fraud prosecution, immunized two key prosecution witnesses but refused to immunize two other witnesses notwithstanding that those latter two witnesses had previously testified before the Grand Jury.[9]

The *DePalma* court dismissed out of hand the notion that Federal Rule of Evidence 804(b)(5) could justify the direct admission of the Grand Jury testimony. In so ruling, the Court noted:

> "The complicated interplay of rights, those of the Government, of the defendant Horowitz, and the

[8] See, Petition for Rehearing with Suggestion for Rehearing Before the Fully Constituted Court In Banc, at p. 6-7, filed by Petitioner in the Court of Appeals on Dec. 12, 1979.

[9] Although *DePalma* is silent concerning prior grants of immunity to the two potential defense witnesses for the purpose of eliciting grand jury testimony, it appears from the context of that case that no such prior immunity had been sought or received. If the two witnesses had received earlier immunity, then *DePalma* and the instant case are virtually identical. If they had not received earlier immunity, then the instant case is far more compelling for the reasons given *supra*. at 12-13.

witnesses who now claim their Fifth Amendment privilege, do not permit a clear enunciation of the interests of justice sufficient to involve the exception of Rule 804(b)(5)."

476 F. Supp. at 776 n.4, quoting from the Court's earlier decision of December 21, 1978.

While the Court of Appeals in the instant case hinged its decision on Rule 804(b)(1), the former testimony exception, that distinction is of no significance. The direct admission into evidence of the grand jury testimony, justified under whatever hearsay objection may be arguably applicable, is simply no substitute for, and in any case, hardly a prerequisite of seeking the live testimony of a central witness.[10] The Government in *DePalma* was required to seek immunity for the potential defense witnesses or lose its right to present its own immunized witnesses. Accordingly, *DePalma* stands in direct opposition to the Court of Appeals decision in the instant case, and the two are simply irreconcilable.

The Court of Appeals also characterized Petitioner's position as urging that,

> whenever a defendant wishes to call a witness and is met with a Fifth Amendment plea, there exists a universal rule requiring that the Government grant use immunity on demand. Opinion at 14A.

Given the radical set of circumstances presented herein, the effect of reducing Petitioner's argument in such a manner is essentially to hold that under no circumstances does there exist a right to defense witness immunity, and in so holding, the Court's decision runs squarely counter to the growing body of case law recognizing that in some situations, the unfairness involved in preventing access to exculpatory witness amounts to a denial of due process.

[10] It is also the case that reliance upon any of the Rule 804 hearsay exceptions necessitates the analytic bootstrapping discussed *supra*. at 14-16.

See, *United States v. Lang*, 589 F.2d 92 (2nd Cir. 1978); *United States v. Wright*, 588 F.2d 31 (2nd Cir. 1978); *United States v. Jenkins*, 470 F.2d 1061 (9th Cir. 1972); *United States v. Earl, supra.; United States v. Alessio, supra.*; and *United States v. DePalma, supra*. For the Court of Appeals, in the instant case, to reduce Petitioner's argument to one founded upon the recognition of a general right to defense witness immunity, particularly given the uniquely compelling facts herein, amounts to nothing short of a total rejection of the principle first enunciated in *Earl* and embodied in *DePalma*. Consequently, the Court of Appeals decision creates a clear cut schism among the circuits demanding resolution and guidance from this Court.

CONCLUSION

For the foregoing reasons, Petitioner requests this Court to issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For The Fourth Circuit

No. 78-5169

United States of America,
Appellee,

v.

Gerald N. Klauber,
Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Alexander Harvey, II, District Judge.

Argued September 14, 1979 Decided November 29, 1979

Before HAYNSWORTH, Chief Judge, WINTER and MURNAGHAN, Circuit Judges.

Michael E. Marr (Joseph L. Evans on brief) for Appellant; Herbert Better, Assistant United States Attorney (Russell T. Baker, Jr., United States Attorney and Joshua R. Treem, Assistant United States Attorney on brief) for Appellee.

REVISED OPINION

MURNAGHAN, Circuit Judge:

Gerald N. Klauber was indicted on 26 counts under the mail fraud statute, 18 U.S.C. § 1341, and one count of racketeering under 18 U.S.C. § 1962.[1] Ten of the mail fraud counts were nolle prossed prior to trial. The jury found Klauber guilty on the sixteen remaining mail fraud counts and on the racketeering count.

The scheme or artifice to defraud and the pattern of racketeering activity asserted against Klauber grew out of his conduct as a partner in the law firm of Fine and Klauber, P.A. The evidence at trial permitted a jury conclusion that Klauber was engaged in a practice in which, with respect to personal injury cases in which he or his firm represented plaintiffs, Klauber sought inflated statements from doctors in which charges were set forth for visits by the plaintiffs which had not actually occurred. Subsequent to settlements with insurance companies based on such inflated statements from doctors, Klauber reduced the amounts actually remitted to the doctors and sometimes diverted amounts received in settlement with respect to one plaintiff's case to a doctor not involved in the case but retained with respect to some other plaintiff.

Klauber principally appeals because the government refused to grant immunity for a witness, Michael Simons, whom Klauber asserted he wished to call on his behalf. Klauber did not actually call Simons to the stand, advancing as his reason the perceived futility, inasmuch as Simons' attorney had stated he would assert the constitutional privilege against self-incrimination as to every substantive question asked, unless Simons were granted use immunity for his trial testimony.

Simons was a former associate in the firm of Fine and Klauber, P.A. He had testified before the Grand Jury

[1] There was a co-defendant, Howard Fine. However, pursuant to a severance, Klauber was tried alone.

investigating the activities of doctors and lawyers in the Baltimore metropolitan area, the Grand Jury which indicted Klauber. Simons' testimony before the Grand Jury had been pursuant to a grant of use immunity. *See* 18 U.S.C. § 6001 *et seq.* Klauber asked the district judge who presided at the trial to require that the government grant use immunity to Simons to testify in Klauber's defense. The request was denied.

Klauber's proffer of what Simons' testimony would have been, had he been granted immunity, was:

1. Simons would have denied having had a conversation with Powell, another former associate of Fine and Klauber, as to which Powell, under informal or "letter" immunity,[2] had testified as part of the government's case. Powell's testimony had referred to statements by Simons to him relative to destruction of law firm files in circumstances indicative of guilty motivation.

2. Simons would state that file destruction by the law firm was a normal matter carried out in the ordinary course of business and that he had not wilfully destroyed settlement sheets.

3. Simons would testify that clerks at Fine and Klauber inadvertently destroyed files that the firm intended to retain, and that Klauber had no connection with the destruction of files.

4. Simons would contradict testimony of another witness for the government, Dr. Sobkov, to the effect that Sobkov had discussed with Simons inflated medical bills and back-dated medical reports. The Sobkov testimony to

[2] *See United States v. Librach,* 536 F.2d 1228, 1230 (8th Cir.), *cert. denied,* 429 U.S. 939 (1976). For the purposes of discussion, we assume that such "letter" immunity was equivalent to use immunity. In another case directly presenting the issue of whether they are identical, we do not foreclose ourselves from questioning that assumption. *See* Note, *The Sixth Amendment Right to Have Use Immunity Granted to Defense Witnesses,* 91 Harv. L. Rev. 1266, 1268 n.15 (1978).

which the proffer was directed had been elicited not by the government but by the defendant himself on cross-examination of Sobkov.

Since Klauber did not call Simons to the stand, the contention that he would have asserted his Fifth Amendment right and refused to testify without a grant of immunity from the government is not established as we believe it normally would be required to be for the question Klauber raises to be preserved.[3] However, Klauber's counsel did establish in the record that he had spoken to counsel for Simons and received a flat statement that Simons would not testify as to any aspect of the matter without a grant of immunity covering any topic on which he might be called to give answers. The action of the government at the trial indicated that it accepted the fact that Simons would not testify absent a grant of immunity. We shall, therefore, proceed on the assumption that the point had been properly preserved. However, for future guidance of trial judges and of counsel we point out:

A. Statements of intention are not the same as the actual thing in such circumstances. A witness could well be reluctant to testify and looking for a way to avoid going on the stand, although, especially when he is a member of the Bar, prepared to do his duty in court if actually put on the stand. Such a witness might well state in advance that he would not testify and would invoke the Fifth Amendment in the hopes that he thereby would not be called. Yet, if he were, in fact, summoned and put under oath, he might, indeed, testify.[4]

B. The right to invoke the Fifth Amendment as to any question put is not absolute. The trial judge in appropriate

[3] *Cf. United States v. Wright,* 588 F.2d 31, 35-7 (2d Cir. 1978), *cert. denied,* U.S. (1979).

[4] It is of passing interest that Paul Gibbons, a Fine and Kaluber associate, had to be given use immunity to secure his testimony before the Grand Jury. However, when called as a defense witness by Kaluber, he testified without invoking the Fifth Amendment privilege.

cases may determine that a foundation for invocation of the Fifth Amendment does not exist. *Zicarelli v. New Jersey Investigation Comm'n,* 406 U.S. 472, 478 n.12, 480-81 (1972); *Hoffman v. United States,* 341 U.S. 479, 486 (1951); *cf. Richardson v. State,* 285 Md. 261, 265, 401 A.2d 1021, 1023-4 (1979).

We cannot, of course, speculate on what might have happened in either of these two areas had Simons, in fact, been put on the witness stand. However, we cannot say that the testimony proffered by Klauber's counsel would inherently have tended to incriminate Simons.

When we turn to Klauber's assertion of a supposed duty of the government at trial to grant immunity to Simons or of a responsibility of the district judge to invoke sanctions for a refusal of the government to grant immunity, it is important at the outset to highlight the inadequate foundation which exists for the argument. Although Klauber's counsel, by his proffer of what Simons' testimony at trial would be, indicated a detailed knowledge of what Simons stated before the Grand Jury,[5] there is nothing in the record to show what Simons' testimony before the Grand Jury actually was. Klauber's counsel did not at the time of trial demand production of Simons' Grand Jury testimony, because, he said at oral argument, he knew the government would not call Simons, so that the Jencks Act, 18 U.S.C. § 3500, would not apply.[6]

[5] Klauber's counsel stated at argument that his proffer covered any matter testified to before the Grand Jury which he would hope to elicit from Simons were he available at the trial.

[6] Klauber had sought prior to trial to adopt a motion under Fed. R. Crim. P. 16(a) by his co-defendant Fine broadly addressed to any exculpatory material contained in the Grand Jury minutes, including material in Grand Jury testimony of associates of Fine and Klauber, P.A. The motion by Fine, and Klauber's adopting motion were denied on the basis that following a review of the Grand Jury minutes the district judge was satisfied that the government had sufficiently complied with its responsibility to supply exculpatory material. Klauber has not asserted on this appeal that the denial was erroneous.

The Jencks Act requires that, where a witness called by the United States has testified on direct, the court, on defendant's motion, shall order the United States to produce any statement (specifically including a statement made by the witness to a grand jury) of the witness in the possession of the United States which relates to the subject matter of the direct testimony of the witness. Perhaps Klauber's counsel felt foreclosed by the language of 18 U.S.C. § 3500(a):

> In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery or inspection until said witness has testified on direct examination in the trial of the case.

However, the prohibition on obtaining the Grand Jury statement contained in that statute is clearly inapplicable in this case since the very fact that the government did not intend to call Simons lifts the Simons Grand Jury testimony out of the definition of the statements as to which the prohibition in 18 U.S.C. § 3500(a) applies. Hence, if an independent basis for obtaining Simons' Grand Jury testimony existed, 18 U.S.C. § 3500(a) was no bar. Whether it would be a bar up until the time when the witness had actually testified at trial if the government had proposed to call Simons as a witness, but the Grand Jury testimony of Simons contained material exculpatory of Klauber, is a question we are not here called upon to address.

Klauber's argument that he was entitled to Simons' testimony at trial, through immunization, has implicit in it the assumption that the testimony would be "material to guilt". If so, the Grand Jury testimony of Simons may have been available to Klauber's counsel under the holding in *Brady v. Maryland,* 373 U.S. 83, 87 (1963):

> We now hold that the suppression by the prosecution of evidence favorable to an accused upon request

> violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

See United States v. Driscoll, 455 F. Supp. 864, 866 (D.N.J. 1978); *but see United States v. Mandel,* 415 F. Supp. 1079 (D. Md. 1976) (distinguishable since the Grand Jury testimony sought in that case was of a witness whom the government intended to call at trial, whereupon the Jencks Act would have caused the testimony to be made available to the defense).

We speak tentatively to this point, since Klauber's counsel did not at trial demand production of the Grand Jury testimony of Simons, nor assert on appeal that it was error to refuse to make such testimony available to him prior to trial. However, an absence of such actions does reduce the basis for a claim that the district judge should have addressed the request for immunization of Simons at all. It is not impossible that the trial judge, upon the making of a *Brady* demand for Simons' testimony, would have inspected the Grand Jury minutes, would have determined that, with or without editing to eliminate irrelevant, prejudicial or inadmissible matter, the testimony was material to guilt, would have made a transcript of the testimony available to defendant's counsel, and would have admitted it into evidence upon tender by the defendant.[7] A determination by the trial judge that the testimony was not material to guilt, which, in light of his actions before trial, would appear to have been indicated, would have undercut any contention that Klauber was entitled to extraordinary measures to secure Simons as a witness at trial.

[7] The secrecy attendant upon Grand Jury proceedings would have been no insuperable barrier to Klauber's quest for Simons' testimony before the Grand Jury, *see* Fed. R. Crim. Proc. 6(e)(2)(c)(1); *Pittsburgh Plate Glass Co. v. United States,* 360 U.S. 395, 400 (1959); *cf. Douglas Oil Co. of Calif. v. Petrol Stop Northwest,* 47 U.S.L.W. 4416 (U.S. April 18, 1979). We cannot say, in the abstract, that the district judge, if a request had been made, would not have concluded that there was a particularized need.

Again speaking tentatively since we are in the area of speculation,[8] we would anticipate that the district judge would not have been concerned that such use of Simons' Grand Jury testimony, had he found it material to guilt, would have presented the threat to this Fifth Amendment right which his testifying at trial, without a further grant of immunity, would have created. *See United States v. Housand,* 550 F.2d 818, 821-24 (2d Cir.), *cert. denied,* 431 U.S. 970 (1977). The introduction of the Grand Jury testimony would involve no volitional act by the witness, Simons; only the Grand Jury testimony would exist after such use, even though it had undergone another transcription in the course of the trial, and the grant of immunity as to its use against Simons would continue unimpaired.

Furthermore the inadmissibility of the Grand Jury testimony, even though hearsay, was by no means a foregone conclusion. It would have been sworn testimony which could only be used against Simons, if false, in connection with a perjury prosecution. *United States v. Housand, supra.* So his motivation for being truthful would have been strong. The fact that it would not, standing as the Grand Jury transcript alone, be subject to cross-examination is of little weight. The defendant, who would be seeking to introduce it, was the one precluded from questioning the witness at the Grand Jury, not the government. The government had a full right to interrogate at the Grand Jury proceedings. If the government, at trial, should wish to contradict the testimony in the Grand Jury transcript out of the witness' own mouth, it would have the right, once the Grand Jury testimony was admitted, to call Simons to the stand and immunize him for the purposes of the cross-examination. We can well imagine that the district judge might have admitted the Grand Jury testimony under Rule 804(b)(1) of the Federal

[8] But, we hope, not of *obiter dictum,* since we do not express a view as to what the rulings of the district judge should have been. We merely allude to the points to emphasize that the raising of them was a necessary preliminary to a contention that Simons should have been immunized at trial.

Rules of Evidence as testimony by an unavailable declarant at another hearing in the same proceeding, at which the government, as the party against whom the testimony would be offered, would have had an opportunity and similar motive to develop the testimony by direct examination. *See United States v. Henry,* 448 F. Supp. 819, 821 (D.N.J. 1978); *United States v. Driscoll,* 445 F. Supp. 864, 866 (D.N.J. 1978). Nor can we, in the abstract, conclude that the Grand Jury testimony could not have satisfied the criteria of the general hearsay exception found in Rules 803(24) and 804(b)(5) of the Federal Rules of Evidence.[9]

Hence, it is highly questionable whether the immunization issue which Klauber seeks to assert is properly before us at all. *Cf. United States v. Gregorio,* 497 F.2d 1253, 1264 (4th Cir.), *cert. denied,* 419 U.S. 1024 (974). Simons' testimony may well have been available by another, less radical route which Klauber's counsel failed to explore. If an alternative method for achieving the desired result was available, but not resorted to, the tangled area which the defendant would have us enter should be avoided. Nevertheless, a word or two on the subject may be appropriate.

First, it is to be emphasized that there was no power in the district judge to confer immunity himself. *United States v. Housand,* 550 F.2d 818, 824 (2d Cir.), *cert. denied,* 431 U.S. 970 (1977); *Thompson v. Garrison,* 516 F.2d 986, 988 (4th Cir.), *cert. denied,* 423 U.S. 933 (1975). At most, he could impose sanctions for a failure by the government to respond affirmatively to a request that the witness be immunized.[10] The two cases which have come to our

[9] *But see United States v. DePalma,* F. Supp. (S.D.N.Y. 1979).

[10] There exist musings about the possibility of an innate power in the courts to immunize witnesses directly themselves in extraordinary situations, where attaining of justice is not otherwise possible. *See United States v. Herman,* 589 F.2d 1191, 1204 (3d Cir. 1978), *cert. denied,* U.S. (1979). The infinity of future possibilities which today are not perceptible to us renders inappropriate an unnecessary decision that such a power in the courts, violative as its existence would be of long-held beliefs as to governmental separation of powers,

attention in which it was indicated that the court would impose sanctions if a witness were not immunized involved unfair conduct by the government, a factor totally absent in Klauber's case. In *United States v. Morrison,* 535 F.2d 223 (3d Cir.), *cert. denied,* 429 U.S. 824 (1976), a witness whom the defendant proposed to call and who was willing to testify was coerced into pleading the Fifth Amendment by government threats of prosecution if she were to testify. The government previously had evinced no interest in prosecuting the witness, and clearly was misusing its powers to obtain an improper result extremely harmful to the defendant and invasive of his Sixth Amendment right to compulsory process for obtaining witnesses in his favor. The court in *Morrison* was not identifying a general right of a criminal defendant to witness immunization in order to secure favorable testimony.[11] Indeed, it is to be doubted that it was suggesting a specific right in that case. Instead, the court was confronted with fundamentally unfair action by the government which made it incumbent to hold that the charges against the defendant should be dismissed. Reluctant thus to frustrate the public's right to have those who have committed crimes brought to justice, the court

absolutely cannot exist. See, however, *In re Daley,* 549 F.2d 469, 479 (7th Cir.), *cert. denied,* 434 U.S. 829 (1977) ("Under no circumstances, however, may a federal court prescribe immunity on its own initiative . . ."). Nevertheless, we are satisfied that, if there is such a power, at all, its application would not be called for here.

[11] It is clear that there is no such general right. *In re Kilgo,* 484 F.2d 1215, 1222 (4th Cir. 1973):

> The sixth amendment assures an accused "compulsory process for obtaining witnesses in his favor." But the authors of the Bill of Rights did not deem it essential to enhance this right by empowering the accused to confer immunity, and nowhere in the Constitution do we find any justification for conditioning the government's ability to grant immunity on a corresponding grant to private individuals.

Cf. United States v. Alessio, 528 F.2d 1079, 1082 (9th Cir.), *cert. denied,* 426 U.S. 948 (1976).

simply set forth a procedure to which the government might resort, if it wished, by which the government's misbehavior, which required dismissal of the charges, might be neutralized. *United States v. Herman,* 589 F.2d 1191, 1199-1200 (3d Cir. 1978), *cert. denied,* —— (1979). If, to insure to the defendant the testimony to which he had been entitled, and which the government had wrongly denied him, the government chose to correct its outrageous behavior by immunizing the witness, the trial could go forward. Otherwise, the judgment of acquittal would be entered.

In those circumstances, the court's efforts to secure immunization of the witness by the government were not at the urging of the defendant. Quite to the contrary, it had become in the defendant's interest that immunity not be granted.

The other immunization case is *United States v. DePalma,* —— F. Supp. —— (S.D.N.Y. 1979). It involved a scheme of securities fraud in which the government claimed five individuals, one of them the defendant, were involved. The government proposed to immunize the testimony of two of the others, but refused to honor the defendant's request that the remaining two, who were subject to a continuing investigation, be granted use immunity so that the defendant might have the benefit of their testimony. The district judge concluded that it resulted in basic unfairness amounting to a denial of due process for the government to pick and choose among those principally involved in the alleged scheme to defraud as to whom to call and whom effectively to bar defendant from using. That determination led him to rule, not that the two witnesses whose testimony the defendant wanted had to be immunized by the government to prevent dismissal of the charges, but rather that the testimony of the more important of the two witnesses the government proposed to call could not be received unless the government arranged things by grant of use immunity so that the other two

primary witnesses as to the salient events were available to the defendant.[12]

In Klauber's case, we have no situation like that. The only immunized witness whose testimony related to an

[12] An antecedent of *DePalma* was *United States v. Leonard,* 494 F.2d 955, 985 f.n.79 (D.C. Cir. 1974, Bazelon, J. concurring in part and dissenting in part). Judge Bazelon was speculating that, if the government were to introduce an out-of-court statement by a declarant expected to plead the Fifth Amendment, fairness would dictate that the statement should be admitted only if the defendant were assured the right to cross-examine by the government's agreement to a grant of use immunity. No such situation is presented here. The relevance of Judge Bazelon's speculation is weakened for us by the consideration that Judge Winter, a member of this Court, sitting by designation, was the author of the D.C. Circuit's majority opinion and did not concur in what Judge Bazelon wrote.

Another antecedent was *Earl v. United States,* 361 F.2d 531, 534 f.n.1 (D.C. Cir. 1966), in which Chief Justice Warren E. Burger, then a Circuit Judge, ruminated, but made no decision about a situation similar to that in *DePalma*:

> We might have quite different, and more difficult, problems had the Government in this case secured testimony from one eyewitness by granting him immunity while declining to seek an immunity grant for Scott to free him from possible incrimination to testify for Earl. That situation would vividly dramatize an argument on behalf of Earl that the statute *as applied* denied him due process. Arguments could be advanced that in the particular case the Government could not use the immunity statute for its advantage unless Congress made the same mechanism available to the accused. Here we are asked in effect to rewrite a statute so as to make available to the accused a procedure which Congress granted only to the Government.

As *DePalma* makes clear, the problem hypothetically posed by Chief Justice Burger only arises after the defendant has sought a ruling conditioning testimony by the government's immunized witness on a grant of immunity to the witness the defendant wishes to call. That permits the government a choice of what in many cases would be a less drastic alternative: the sacrifice of the testimony by the government's witness. Klauber did not preserve any point arguably raised by the holding in *DePalma* and the rumination in *Earl,* because he did not seek to condition Powell's testimony on an immunity grant to Simons.

area as to which Simons purportedly could testify was Powell. His involvement was peripheral, not central, to the matters charged, as was the case with the witnesses in *DePalma*. Simons' testimony would similarly go to secondary, not primary matters. Completely dispositive is the consideration that Klauber's counsel did not contend that Powell's testimony should have been excluded, absent an immunization of Simons.[13] (Sobkov, the other witness whom Simons supposedly would have contradicted, testified without immunity. He had already been convicted for his part in the matters of which Klauber was accused.)

We do not intend to be understood as acknowledging that, had Klauber preserved the point by a request that receipt of Powell's testimony be conditioned on a use immunity grant to Simons, the rationale of *DePalma* and *Earl* would have been applicable here. Other witnesses, two Fine and Klauber, P.A. former associates, Samuel Blibourn and Paul Gibbons, testified that Powell was a liar. The essential thrust of the Simons testimony which Klauber sought to obtain through use immunity was, therefore, cumulative.

Nor does the argument impress us that, inasmuch as the government had the advantage of immunized testimony from Simons at the Grand Jury, Klauber was, on fairness grounds, entitled to his immunized testimony at trial. Simons had obviously been under consideration in connection with the Grand Jury investigation and had been called to testify under an immunization. Had he not been called before the Grand Jury at all, it is difficult to see any foundation for the defendant's argument here. Following his testimony before the Grand Jury, Simons was virtually in the same position as if he had been permitted to stand upon his claim of the Fifth Amendment. *In re Kilgo,* 484 F.2d 1215, 1220 (4th Cir. 1973). And a sauce-for-the-goose,

[13] An alleged "runner", Russell Brown, testified pursuant to an immunity agreement, but his evidence was unrelated to what the proffer indicated would be the substance of Simons' testimony.

sauce-for-the-gander approach is not really pertinent. The sole consequence, for purposes of the issue with which we are concerned, of the immunization at the Grand Jury hearing was to develop testimony potentially favorable to Klauber which he and his counsel might otherwise never have known existed. To the extent that the testimony would be favorable to Klauber, the immunization at the Grand Jury, therefore, worked to the advantage of Klauber. Without an immunization for purposes of the Grand Jury, the testimony was entirely unavailable so long as Simons chose to plead the Fifth Amendment. The fact that it remained so after the Grand Jury testimony did not, from Klauber's point of view, worsen the situation. The government's immunization of Simons before the Grand Jury, therefore, gave the government no advantage respecting the potentially favorable testimony, nor did it work any perceivable hardship on Klauber. The government's unwillingness to immunize the witness, in such circumstances, does not amount to bad faith, nor did it lead to unfairness to Klauber. This is so regardless of whether, as suggested, *supra,* the immunized Grand Jury testimony would, on *Brady* principles, have been available to Klauber and admissible in evidence if offered by him. If the Simons Grand Jury testimony were so available, absolutely all arguments based on the government's being somehow better off than the defendant evaporate.

Hence, in the final analysis, Klauber's argument comes down to a contention that, whenever a defendant wishes to call a witness and is met with a Fifth Amendment plea, there exists a universal rule requiring that the government grant use immunity on demand. *In re Kilgo,* 484 F.2d 1215, 1225 (4th Cir. 1973) is against Klauber on that point. Even a recent note sympathetic to the position of defendants would not g so far. Note, *The Sixth Amendment Right to Have Use Immunity Granted to Defense Witnesses,* 91 Harv. L. Rev. 1266 (1978).

We do not conceive it to be a responsibility of the government to make its immunization powers available to

the defendant for such a purpose since the government, acting for all citizens, must conduct a balancing of interests evaluation whenever it decides whether to immunize a witness, realizing that the process almost always leads to the escape from trial and punishment of someone guilty of an offense against society and its laws. *United States ex rel. Tatman v. Anderson,* 391 F. Supp. 68, 71-2 (D. Del. 1975). "The public suffers when a criminal is not prosecuted, and this detriment must be weighed carefully against the public benefit that would accrue from the information which immunity can compel. The balancing of these interests has not been left to persons unanswerable to the public." *In re Kilgo,* 484 F.2d 1215, 1222 (4th Cir. 1973).

Klauber also has raised an objection on the grounds that some of his activities which were proven at trial, while criminal, were outside the time limits set in the indictment and, therefore, were improperly admitted under Fed. R. Evid. 403. However, the testimony was closely linked to the activities charged and was relevant on the issue of intent. Fed. R. Evid. 404(b).

Defendant makes the further point that the evidence went to the intent of others in his firm and not to his individual intent. The point is not apt as to much of the complained-of evidence. However, to the extent that it does apply, the situation was one in which the defendant was one of two essentially equal partners in a law firm and the circumstances permitted the jury to infer that what was done by others in the firm under Klauber's direction and control could be imputed to him.

Klauber further complains about the jury's being informed of the Maryland barratry statute and of the Code of Professional Responsibility. Both were relevant to the attitude Klauber, as a member of the Bar, should have maintained toward practices that were proved. They were properly admissible. *United States v. Reamer,* 589 F.2d

769, 771 (4th Cir. 1978), *cert. denied,* —— U.S. —— (1979).

AFFIRMED.

APPENDIX B

United States Court of Appeals
For The Fourth Circuit

No. 78-5169

United States of America,
Appellee,

v.

Gerald N. Klauber,
Appellant.

ORDER

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Murnaghan, Jr., with the concurrence of Judge Haynsworth. Judge Winter dissents.

For the Court,
/s/ William K. Slate, II,
Clerk.

APPENDIX C

(Corrected Order)

United States Court of of Appeals
For The Fourth Circuit

No. 78-5169

United States of America,
Appellee,

v.

Gerald N. Klauber,
Appellant.

ORDER

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Murnaghan, Jr., with the concurrence of Judge Haynsworth. Judge Winter dissents.

For the Court
/s/ William K. Slate, II,
Clerk.

Supreme Court, U.S.
FILED
APR 2 1980
MICHAEL RODAK, JR., CLERK

GERALD N. KLAUBER	*	IN THE
	*	
Petitioner	*	SUPREME COURT
	*	
v	*	OF
	*	
UNITED STATES OF AMERICA	*	THE UNITED STATES
	*	
	*	On Petition for Writ of Certiorari
Respondent	*	
	*	No. 79-1229

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SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

Gerald N. Klauber, Petitioner, by his counsel, Michael E. Marr, files the following Supplement to Petition for Writ of Certiorari, and states:

1. Petitioner filed his Petition for Writ of Certiorari on February 7, 1980.

2. Petitioner has recently learned of a case, Virgin Islands v Smith, Case No. 79-1212, United States Court of Appeals for the Third Circuit, decided, February 5, 1980, which addresses substantially the same issue as Petitioner has raised in his Petition.

3. The issue presented, both in the instant Petition as well as in Virgin Islands v Smith, concerns when, and under what circumstances, the Government's refusal to confer use-immunity upon a defense witness violates an accused's right to due process.

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4. Whereas, in the instant case, the United States Court of Appeals for the Fourth Circuit held that no such right can exist, Virgin Islands v Smith held that the Defendant's right to due process was violated by the Government's refusal to immunize a potential defense witness.

5. Accordingly, given the factual similarity between Virgin Islands v Smith and the instant case, there now exists a clear conflict between the Third and Fourth Circuits requiring resolution by this Court.

6. Since Virgin Islands v Smith is not yet reported, Petitioner is attaching hereto forty (40) copies of the slip opinion.

Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify, that on this 31st day of March 1980, five (5) copies of the foregoing Supplement to Petition for Writ of Certiorari were mailed to Stephen Shapiro, Assistant United States Solicitor General, Department of Justice, Washington, D.C. 20530.

Michael E. Marr

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 79-1212, 79-1213, 79-1214 and 79-1215

GOVERNMENT OF THE VIRGIN ISLANDS,
Appellee

v.

GLEN SMITH, ELTON RIEARA, ELVIS SMITH
and ROLAND GEORGES
Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VIRGIN ISLANDS

(D.C. Crim. Nos. 78-00138-01, 78-00138-02,
78-00138-03, and 78-00138-04)

Argued December 7, 1979

Before: GIBBONS, WEIS and GARTH, *Circuit Judges*

(Filed February 5, 1980)

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OPINION OF THE COURT

GARTH, *Circuit Judge*

In *United States v. Herman*, 589 F.2d 1191 (3d Cir. 1978) *cert. denied* 441 U.S. 913 (1979), this court explored the circumstances in which a defendant may claim that immunity must be provided to defense witnesses. Although the *Herman* court rejected the claim for immunity in the case before it, it recognized two possible situations in which the due process clause might compel the granting of immunity to defense witnesses. First, it noted that in cases where government actions denying use immunity to defense witnesses were undertaken with the "deliberate intention of distorting the judicial fact finding process," the court has the remedial power to order acquittal unless on retrial the government grants statutory immunity. 589 F.2d at 1204. Secondly, it noted that in certain cases a court may have "inherent authority to effectuate the defendant's compulsory process right by conferring a *judicially* fashioned immunity upon a witness whose testimony is essential to an effective defense." *Id.* (emphasis added).

The question of defense witness immunity surfaces once again in this case. Here, as contrasted with *Herman*, the record reveals sufficient evidence to constitute a *prima facie* showing under either of these due process theories.[1] Accordingly, we remand to the district court for an evidentiary hearing under the *Herman* guidelines to determine whether due process requires that defense witness immunity be granted.

I.

In the early afternoon of June 16, 1978, Roy Phipps was assaulted by four young men. During the assault, which took place at a Saint Thomas housing project, 25 dollars was stolen from Phipps' pockets. This assault occurred shortly after another incident, allegedly involving a marijuanna swindle, had taken place in a nearby courtyard. This latter altercation had also involved Phipps and had attracted the attention of a group of young men. It is undisputed that Phipps' assailants were members of this group, but their exact identities were the prime subject of controversy at trial.

During the course of the trial, three of the defendants — Glen Smith (hereinafter referred to as "Glen"), Elton Rieara and Roland Georges — sought to introduce the testimony of one Ernesto Sanchez. Sanchez had previously made a statement to the police which inculpated himself as one of Phipps' attackers[2] and identified three

1. While we recognize that this court has not adopted the statutory theory advocated by the dissent in *Herman*, 589 F.2d at 1205, with its abuse of discretion standard, it bears noting that the result which would be reached under such a theory is consistent with the result we reach here under *Herman's* due process analysis.

2. Sanchez was also indirectly inculpated by Phipps' testimony. Phipps had stated that one of his assailants was a "tall, slender Puerto Rican" who had carried a knife. Sanchez apparently met that physical description.

others, who were nicknamed "Scotto," "Mon" and "Mouth," as perpetrators of the crime. Apparently, these nicknames were not the nicknames by which Glen, Rieara or Georges were known. Elvis Smith, on the other hand, was known as "Scotto." Thus, while Sanchez' statement incriminated Elvis Smith, it would have implicitly exculpated the other three defendants, Glen, Rieara and Georges. Therefore, hoping that Sanchez' trial testimony would track his earlier statement to the police, these three defendants (hereinafter referred to as the "defense") called Sanchez as a defense witness.[3]

Sanchez' testimony was not so easily forthcoming, however. He declined to make any significant substantive statement, claiming his fifth amendment privilege against self-incrimination. T.R. at 249-50. At that point, the defense, asserting an exception to the hearsay rule, claimed that Sanchez had become an unavailable witness and thereby sought to introduce into evidence the earlier statement which Sanchez made to the police. T.R. at 250. The government opposed the introduction of the statement arguing that it would be unable to cross-examine the hearsay declarant (Sanchez). T.R. at 252. The trial court sustained the government's objection.

After having been unsuccessful in obtaining the admission into evidence of Sanchez' prior statement, the defense then raised the subject of granting Sanchez immunity. T.R. at 253. Sanchez, who was less than sixteen years of age when the assault against Phipps was committed, came within the exclusive jurisdiction of the ju-

3. It was represented to the court at oral argument that Sanchez was in the custody of the United States Attorney prior to trial and that defense counsel were denied access to him. Therefore, when the defendants called Sanchez, they could not predict the content of his testimony. The government has thus far failed to explain the basis of its exclusive proprietory claim to Sanchez as a witness or why it sequestered Sanchez prior to the trial.

venile authorities in the Virgin Island Attorney General's office. The record reveals that Mr. Leonard Francis of that office had offered to grant Sanchez use immunity on the condition, prompted only out of prosecutorial courtesy, that the United States Attorney consent. T.R. at 206, 253. For reasons which were unexplained at trial and which the United States Attorney did not explain to this court at oral argument, this consent was never granted. Accordingly, the potentially exculpatory evidence which the defense desired to offer through Sanchez' testimony, was never presented to the jury.

Without the benefit of Sanchez' testimony, all four defendants were convicted on charges of robbery, and each was sentenced to six and one-half years of imprisonment. Each of the defendants has set forth various errors on appeal. A primary contention, common to Glen, Georges and Rieara is that their due process rights were violated by the failure to grant immunity to Sanchez. We find no basis by which to sustain any other claim they assert except for the immunity error.[4] We therefore affirm, by separate judgment order, the conviction of Elvis Smith who could not have benefited from Sanchez' testimony. With respect to the remaining three defendants — Glen, Rieara and Georges — all or any of whom might be exculpated by Sanchez' testimony, we remand for an evidentiary hearing to determine whether Sanchez should be immunized so as not to violate the defendants' due process rights.

4. All four defendants raise numerous arguments in addition to their claim that immunity should have been granted to a defense witness.

Glen Smith claims in appeal No. 79-1212:

1. That the trial court erred in denying a motion to reverse based on delay in furnishing the transcript.
2. That the trial court erred in refusing to strike Phipp's testimony.

II.

A.

In *United States v. Herman, supra*, this court took specific note of "our governmental system's strong tradition of deference to prosecutorial discretion" in conjunction with granting statutory immunity. 589 F.2d at 1204. It also noted the "tendency of the executive branch to exercise that discretion in ways that make it more likely that defendants will be convicted." *Id.* Nevertheless, *Herman* recognized that under certain circumstances due process may require that the government afford use immunity for a defense witness. This recognition followed from this court's decision in *United States v. Morrison*, 535 F.2d 223 (3d Cir. 1976) which held that where prosecutorial misconduct occurred (in that case, intimidation of a defense witness), the government could be directed to either obtain use immunity, so that the witness could testify, or suffer a judgment of acquit-

NOTE 4 — *(Continued)*

3. That the trial court erred by denying a motion to dismiss based upon a change of time negating Glen Smith's alibi.
4. That the trial court erred in refusing to admit the extra-judicial statement of Ernesto Sanchez.
5. That the prosecutor's conduct constituted reversible error based upon prejudicial inferences.
6. That the trial court erred in instructing the jury on extra-judicial identification.
7. That the trial court erred in instructing the jury on flight.
8. That the trial court erred in rebutting defense counsel's argument concerning the jury's being the final judge of the facts.
9. That the trial court erred in rebutting defense counsel's argument regarding the lack of corroboration.

Elton Rieara claims in appeal No. 79-1213:

1. That the trial court erred in denying defendant's motion for acquittal.

tal. *Morrison*, however, did not specify the burden which the defendant was required to meet in order to obtain such extraordinary relief. The dimensions of the defendant's burden, in this respect, were not established until *Herman* when this court stated:

> [W]e think that the evidentiary showing required to justify reversal on that ground must be a substantial one. The defendant must be prepared to show that the government's decisions were made with the deliberate intention of distorting the judicial fact finding process.

589 F.2d at 1204.

Thus, with full recognition that a court seriously intrudes into the realm of the executive when it orders the government to grant statutory immunity to a defense witness, *Herman* nonetheless affirmed the availability of such a remedy. But it conditioned this remedy on a showing by the defendant that the government's deci-

2. That the trial court erred in refusing to admit the prior statement of Ernesto Sanchez.

Elvis Smith claims in appeal No. 79-1214:

1. That the trial court committed reversible error by admitting the hearsay testimony of Ruth Dazle.

Roland Georges claims in appeal No. 79-1215:

1. That prosecution cross-examination of Roland Georges respecting alleged threats warranted a mistrial.
2. That the testimony of Mrs. Dazle as to statements made by Roland Georges constituted inadmissible hearsay.
3. That the prior statement of Ernesto Sanchez, impliedly exculpating Roland Georges, should have been admitted into evidence.

After consideration of these contentions, we reject them all as without merit. Moreover, inasmuch as the defense witness immunity contention is not claimed by defendant Elvis Smith, since the evidence which would be forthcoming would inculpate, rather than exculpate him, we have disposed of his appeal, at 79-1214, simultaneously with the filing of this opinion.

sion not to provide immunity was a decision made "with the deliberate intention of distorting the judicial factfinding process." Absent this type of prosecutorial misconduct, a defendant is foreclosed from insisting that statutory immunity be granted his witness.

In *Herman*, no evidence of "distortion" or prosecutorial misconduct appeared. Hence the sought after immunity was not ordered. By contrast, the record in this case reveals a *prima facie* showing of government action that might well fall within guidelines of *Morrison* or *Herman*.[5] We therefore turn to a consideration of the record.

B.

Our review of the record reveals that the United States Attorney's decision not to consent to immunity for Sanchez was apparently intimately involved with the strategy for prosecuting appellants' cases. First, the prosecution was aware that its case, which rested almost entirely on Phipps' testimony, was inherently weak.[6] Even though Sanchez' testimony, if consistent with his earlier statement to the police, might be vulnerable to a credibility attack, it would be severely damaging to the prosecution's case against three of the defendants. Secondly, by refusing to consent to the Attorney General's proposed immunization of Sanchez, the government not only prevented Sanchez from testifying at trial, but that refusal also furnished the predicate for the government's

5. We observe that trial in the instant case did not commence until November 15, 1978. *Herman* was not decided until later that month. It is therefore evident that neither counsel or the court had the benefit of *Herman's* immunity discussion. *Herman* was discussed before this court on appeal, however. *See* note 8 *infra*.

6. Phipps was slightly retarded and had various other physical ailments. His testimony at trial was not always responsive to questioning and was sometimes confusing and difficult for the court and the attorneys to comprehend.

objection to admitting Sanchez' statement given to the police. That argument focussed on Sanchez' unavailability for cross-examination about his prior statement, and accordingly the government claimed that the statement should not be admitted. *See* T.R. at 250-52. Finally, and most important, the fact that the United States Attorney had no jurisdiction over Sanchez as a juvenile and gave no justification for refusing to consent to the immunity offered by the juvenile authorities who did have jurisdiction over Sanchez, suggests that the prosecution deliberately intended to keep this highly relevant, and possibly exculpatory, evidence from the jury.

If after an evidentiary hearing the district court finds that Sanchez' testimony would be relevant[7] and that the actions of the United States Attorney, as they bear upon Sanchez' refusal to testify and the immunity proferred by the Attorney General, were taken with the deliberate intention of distorting the factfinding process, then the district court should enter a judgment of acquittal as to defendants Glen, Rieara and Georges, unless the government consents to grant statutory use immunity to Sanchez. *See United States v. Morrison*, *supra*. In the latter event, obviously a new trial will be warranted.

7. Immunity granted under this theory need not be predicated upon a finding that the witness' testimony is clearly exculpatory or otherwise essential to the defendant's case. *Cf.* Part III *infra*. As this court noted in United States v. Morrison, *supra:*

> . . . where the Government has prevented the defendant's witness from testifying freely before the jury, it cannot be held that the jury would not have believed the testimony or that the error is harmless.

535 F.2d at 228. The trial court must find, however, that the proffered testimony would be relevant to the defendant's case.

III.

A.

In addition to the statutory immunity discussed in *Herman* and in Part II above, *Herman* also suggested the availability of still another form of immunity, which stems from a court's inherent power:

> But while we think that the court has no power to order a remedial grant of statutory immunity to a defense witness absent a showing of unconstitutional abuse, a case might be made that the *court has inherent authority to effectuate the defendant's compulsory process right by conferring a judicially fashioned immunity upon a witness whose testimony is essential to an effective defense.*

589 F.2d at 1204. (emphasis added). *See also United States v. Bacheler*, —— F.2d ——, 1979-2 USTC ¶9695 (3d Cir. 1979); *In Re Grand Jury Empanelled February 14, 1978*, 603 F.2d 469 475 (3d Cir. 1979).

Immunity granted in these circumstances differs from the statutory immunity discussed in Part II, *supra*, in two respects. First the need for "judicial" immunity is triggered, not by prosecutorial misconduct or intentional distortion of the trial process, but by the fact that the defendant is prevented from presenting exculpatory evidence which is crucial to his case. Second, the immunity granted is a *court decreed* immunity; it is not achieved by any order directed to the executive, requiring the executive to provide statutory immunity.

In *Herman* we were reluctant to do more than recognize the availability of judicial immunity. There, while recognizing that problems would exist if immunity would be decreed, we nevertheless adverted to the justification for employing such a power, a justification arising from the "due process right to have clearly exculpatory evidence presented to the jury, at least when there is no strong countervailing systemic interest which justifies its exclusion. . . ." 589 F.2d at 1204. We laid the groundwork in *Herman* for such exercise of judicial power, and foresaw its application in certain circumstances. However, the majority in *Herman* did not dwell at any great length on this theory as it had never been raised in the district court nor had it been discussed in the briefs or at oral argument on appeal. 589 F.2d at 1204. Judge Gibbons, writing for the court, properly observed that "if such inherent power [to grant judicial immunity] is to be recognized and standards formulated for its exercise, that task should be performed in a case where the issue was presented by the defendant, and perhaps by the court sitting en banc." *Id.* at 1204-05.

While we sit here only as a panel, and not *en banc*, we are not reluctant, as we were in *Herman*, to face the immunity issue. It has been presented by the defendants,[8] and the evidence, as it is disclosed by the trial record, appears initially at least, to have been tailored to conform to the theory which the *Herman* court projected.

B.

As we noted in *Herman*, *Chambers v. Mississippi*, 410 U.S. 284 (1973), albeit in a context different than immunity, furnishes strong support for the holding that immunity may be required for a defense witness if realistic meaning is to be given to a defendants due process right to have exculpatory evidence presented to the jury. 589 F.2d at 1204. In *Chambers*, the Supreme Court held that Mississippi's strict adherence to its rules of evidence, which prevented the defendant, Chambers, from introducing trustworthy, exculpatory evidence, effectively denied Chambers a fair trial in accordance with

8. This court *sua sponte* directed that supplemental briefs addressed specifically to this issue be filed by all parties prior to the oral argument.

the principles of due process. Chambers had sought to cross-examine a witness who had previously confessed to the same crime; he was prevented from doing so by the state's evidence rule against a party impeaching his own witness. In addition, rigid application of Mississippi's rule against hearsay prevented Chambers from introducing other informal admissions of the witness' guilt which would have exculpated Chambers. The Supreme Court, recognizing the crucial importance of the excluded evidence, reversed Chambers conviction, holding that his due process right to present an effective defense had been violated.[9] To remedy the constitutional deficiency found in *Chambers*, the Court required that Chambers be retried so that the exculpatory evidence, which he had originally been denied, could be admitted at the new trial.

In this case the *prima facie* due process violation revealed by the record, *i.e.*, the denial of exculpatory evidence to which Sanchez could testify, is not different in substance than the violation found in *Chambers*. For paraphrasing *Chambers* by substituting the names of the principals in this case, it is apparent that "to the extent that McDonald's sworn confession [Sanchez's police statement] tended to incriminate him [Sanchez and Elvis Smith], it tended also to exculpate Chambers [Glen, Rieara and Georges]." 410 U.S. at 248.

Other cases involving due process violations based on denying a defendant an effective presentation of his defense have fashioned remedies appropriate to the context in which the violations occurred. Although much that was said in *Chambers* was original to that case, the

9. The Court stressed the fact that the policies which prompted the state's evidentiary rules were not offended by the evidence which Chambers sought to introduce. Recognizing this, the Court refused to let the evidence rules "be applied mechanistically to defeat the ends of justice." 410 U.S. at 302.

basic constitutional doctrine — that the right to present an effective defense inheres in the guarantee of a fair trial — was not new. For example, in *Gideon v. Wainwright*, 372 U.S. 335 (1963) the Supreme Court held that an indigent defendant "haled into court . . . cannot be assured a fair trial unless counsel is provided for him." *Id.* at 344. Consequently, the Court ruled that due process requires that the sixth amendment right to counsel be imposed on the states. Even earlier, in *Roviaro v. United States*, 353 U.S. 53 (1957), the Court had recognized the same right when it stated that the government's "informers privilege" must give way "[w]here the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause. . . ." *Id.* at 60-61. Again, in *Brady v. Maryland*, 373 U.S. 83 (1963), the Government's actions in suppressing exculpatory materials known to it, but not known to the defendant, was found to trench upon the same due process right to present an effective defense as is implicated here. *Chambers*, *Roviaro* and *Brady*, like *Gideon v. Wainwright*, recognize that the essential task of a criminal trial is to search for truth, and that this search is not furthered by rules which turn the trial into a mere "poker game" to be won by the most skilled tactician. *See Williams v. Florida*, 399 U.S. 78, 82 (1970). Thus, these cases resulted in new trials, thereby vindicating the defendant's right to present an effective defense. We are therefore not concerned with a new or unique constitutional right, but rather with the prescription of a new remedy to protect an established right.

While the constitutional violation in this case is the same as the violation found in the *Chambers* and *Brady* genre of cases — *i.e.*, depriving a defendant of clearly exculpatory evidence necessary to present an effective defense — a new trial such as was provided in those cases

would be insufficient to remedy the constitutional infringement which may have occurred here. Any remedy in the present case must take into account the fact that a retrial would be meaningless unless the evidence in issue may be compelled. That compulsion can only be accomplished in the context of a case such as the instant one, by granting immunity to a defense witness, once it is established, however, that the conditions for such a remedy have been satisfied. Although we have characterized the immunity remedy as "new," it is new only in the sense of its application to this type of case. Both the Supreme Court and this court have previously found an inherent judicial power to grant witness immunity in order to vindicate constitutional rights. *See Simmons v. United States*, 390 U.S. 377, 394 (1968) (testimony at 4th Amendment suppression hearing); *In re Grand Jury Investigation*, 587 F.2d 589, 597 (3d Cir. 1978) (testimony predicate to Speech and Debate Clause defense); *United States v. Inmon*, 568 F.2d 326, 332-33 (3d Cir. 1978) (testimony predicate to double jeopardy defense). Moreover, as the *Herman* court indicated when referring to *Simmons*, the Supreme Court case which pioneered the concept of judicial immunity:

> It would seem that a case in which clearly exculpatory testimony would be excluded because of a witness's assertion of the fifth amendment privilege would present an even more compelling justification for such a grant [of judicial immunity] than that accepted in *Simmons* itself.

589 F.2d at 1204.

Due to the unique and affirmative nature of the immunity remedy and fundamental considerations of separation of powers, grants of immunity to defense witnesses must be bounded by special safeguards and must be made subject to special conditions. This does not mean, however, that a due process right in an immunity context is to be protected any less vigilantly than the

same due process right which arises in a *Chambers* or a *Brady* context. Indeed, the safeguards which we mandate before requiring this remedy are common to those found in *Chambers*.[10] The due process rights in both situations are entitled to the same protection. But *Chambers* and *Herman* both dictate that the opportunities for judicial use of this immunity power must be clearly limited: immunity must be properly sought in the district court; the defense witness must be available to testify; the proffered testimony must be clearly exculpatory; the testimony must be essential; and there must be no strong governmental interests which countervail against a grant of immunity.[11]

Of crucial significance to the Supreme Court's decision in *Chambers*, was the clearly exculpatory and essential nature of the evidence which was excluded. We

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10. Central to the *Chambers'* analysis were two factors: the clearly exculpatory nature of the excluded evidence and the fact that the state had no interest in rigid enforcement of its evidentiary rules.

11. Prior cases in this circuit do not preclude this form of judicial immunity. United States v. Berrigan, 482 F.2d 171, 191 (3d Cir. 1973), disclaimed a court's blanket power to grant immunity to "*any* defense witness who might refuse to give testimony on grounds of self-incrimination." (emphasis added) The requirements for judicial immunity which we specify are much more stringent: the power to grant judicial immunity only applies to a witness whose testimony is exculpatory and essential to the defense and when there are no strong counterveiling government interests. Neither United States v. Rocco, 587 F.2d 144 (3d Cir. 1978) *cert. denied* 440 U.S. 972 (1979), nor United States v. Niederberger, 580 F.2d 63, *cert. denied*, 439 U.S. 980 (1978), discuss the subject of *judicially fashioned* immunity for essential defense witnesses. Hence, they do not bear on our holding here. Insofar as both opinions discuss *statutory* immunity, which is the subject of this opinion in Part II *supra*, neither case was decided in a context involving prosecutorial misconduct or deliberate distortion of the trial process by the government. Therefore their authority, in respect to immunity, is limited and in no way detracts from either the statutory immunity or the judicial immunity analysis in which we have here indulged.

have grave doubts that the Court would have mandated deviation from Mississippi's rules of evidence, had it not been necessary to preserve the "fundamental fairness" of the criminal trial.[12] Moreover, the Court was able to appreciate the significance of the excluded evidence because it had been clearly identified by the defendant at trial who had made a proper application for its admission. Similarly, before a court can grant immunity to a defense witness, it must be clear that an application has been made to the district court naming the proposed witness and specifying the particulars of the witness' testimony. In addition, the witness must be available and the defendant must make a convincing showing sufficient to satisfy the court that the testimony which will be forthcoming is both clearly exculpatory and essential to the defendant's case. Immunity will be denied if the proffered testimony is found to be ambiguous, not clearly exculpatory, cumulative or if it is found to relate only to the credibility of the government's witnesses.[13] Once

12. It is to be noted that the Court, in *Chambers*, did not hold the challenged Mississippi evidence rules to be unconstitutional. Instead of striking the rules completely, the Court found, for the purposes of the case before it, that erection of an exception to the rules would accomplish the required result.

13. The standards formulated here take into account the objections to judicial immunity which have recently been expressed in the opinions of other courts of appeals. For example, in United States v. Klauber, No. 78-5169 (4th Cir. Nov. 29, 1979), the Fourth Circuit, in refusing to grant immunity to a defense witness, noted that the defense witness had not appeared in court, that there was no showing that the witness would be able to claim the fifth amendment privilege and that the defendant had made no showing as to what the content of the proffered testimony would be — let alone whether it would be exculpatory. Similarly, in United States v. Wright, 588 F.2d 31 (2d Cir. 1978) *cert. denied*, 440 U.S. 917 (1979), the Second Circuit rejected a claim of defense witness immunity when the defendant failed to demonstrate that the witness would not testify without immunity or that the failure to grant immunity prejudiced his trial. Because of the standards we impose before judicial immunity can be granted, *Klauber* and *Wright* are not inconsistent with the result reached in this opinion.

the court determines that the defendant has satisfied this threshhold burden, the focus then shifts to consideration of the state's countervailing interests, if any.

As we have observed, *see* note 12 *supra*, in *Chambers* the Supreme Court did not strike down the Mississippi evidence rules which were challenged. It merely held that the state had no legitimate interest in the mechanical application of those rules. Presumably, if Mississippi had a legitimate countervailing interest in the rigid application of its evidence rules, that interest would have figured more prominently in the Court's decision. Here, where we are concerned not with mere evidentiary rulings, but with an affirmative grant of relief in the form of immunity, traditionally an exercise of the executive's power, it is even more imperative that we recognize, and be solicitous towards, legitimate state interests. In the immunity area we cannot ignore, nor will we blind ourselves to the effect that a grant of immunity (as contrasted with an erroneous evidentiary ruling) may have on persons who are not parties to the criminal proceeding and on society as a whole. "[A] person suspected of crime should not be empowered to give his confederates an immunity bath." *In re Kilgo*, 484 F.2d 1215, 1222 (4th Cir. 1973).

Grants of judicial immunity impact most directly on the government's decision to prosecute and on the manner of its prosecution. Frequently, the government will have a legitimate interest in prosecuting the very witness whom the defendant seeks to immunize. But this does not mean that no accommodation can be reached between the government's interest as prosecutor and the defendant's constitutional right to present an effective and entire case. In many instances, use immunity, which was all that was sought here and is all that is constitutionally required, *Kastigar v. United States*, 406 U.S. 441 (1972), is virtually costless to the government. For example, the government may have already assem-

bled all the evidence necessary to prosecute the witness independent of the witness' testimony. Or the government may be able to "sterilize" the testimony of the immunized witness and so isolate it from any future testimony of the witness that it would not trench upon any of the witness' constitutional rights if he were subsequently to be prosecuted. *See Kastigar v. United States, supra.* Finally, the government may seek a postponement of the defendant's trial so that it may complete its investigation of the defense witness who is the subject of an immunity application.[14] While these options are not intended to be all inclusive, if any of these options are available to the government, then it would appear to us that the government would have no significant interests which countervail the defendant's due process rights. Any interest the government may have in withholding immunity in such a situation would be purely formal, possibly suspect and should not, without close scrutiny, impede a judicial grant of immunity.[15]

On the other hand, where the government either rebuts the defendant's showing or establishes that the public interest would be disserved by a grant of immunity to a defense witness or that such a grant would entail significant costs to it, it would be appropriate for the immunity application to be denied. In either event, whether it grants or denies the application, the district court should be careful to explain the basis of its ruling. We hold that, in cases where the government can present no

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14. For discussion of the "cost" of use immunity in this context *see* Note, *The Sixth Amendment Right to Have Use Immunity Granted to Defense Witnesses*, 91 *Harv. L. Rev.*, 1266, 1274-80 (1978).

15. In *Herman*, this court specifically stated:

> Where the prosecution's interest in withholding immunity was merely formal, the *Chambers* rationale might perhaps permit a grant of immunity.

589 F.2d at 1204 n.13.

strong countervailing interest, a court has inherent authority to immunize a witness capable of providing clearly exculpatory evidence on behalf of a defendant who has met our stated conditions.

C.

The record in this case shows that the issue of defense witness immunity was properly raised in the district court. In addition, the record clearly suggests that the defense would be able to offer proof that Sanchez' testimony would be exculpatory. Based on his previous statement to the police, it has been contended before us that Sanchez would testify that Glen, Rieara and Georges did not participate in the crime. This claim might be buttressed if defense counsel are given the opportunity to interview Sanchez. *See* note 2 *supra*. Moreover, it would be difficult to argue that Sanchez' eyewitness testimony (as appears in the police statement) would not be essential to the defense case.

On the other side of the coin, it appears from the record that the United States Attorney would have little claim to any governmental interest in opposing a grant of immunity to Sanchez. As we have previously observed, only the Attorney General of the Virgin Islands has jurisdiction to prosecute Sanchez or, for that matter, to immunize him. The bar to such immunization was erected when, as a matter of comity, the Attorney General asked for the consent of the United States Attorney. For reasons not explained in this record that consent was not forthcoming and the Attorney General, as a consequence, refused to immunize Sanchez.

Nonetheless, whether judicial immunity is warranted is a matter to be determined by the district court in the first instance. We therefore vacate the sentences of Glen, Rieara and Georges and remand to the district court. On remand it will be for the district court, after an evidentiary hearing, to determine whether judicial im-

munity is required to vindicate the defendants' rights to a fair trial. If immunity is so required, then a new trial shall be ordered. If not, and the district court has also found in accordance with Part II, *supra*, that no statutory immunity is warranted, then the judgments of sentence entered against defendants Glen, Rieara and Georges shall be reinstated, subject only to our further review if sought.

IV.

We have discussed two theories in which due process requires the testimony of defense witnesses to be immunized. When the court finds prosecutorial misconduct by the government's deliberate intent to disrupt the factfinding process, it should order the government to grant statutory immunity to the defense witness or face a judgment of acquittal. In addition, even if there is no evidence of such prosecutorial misconduct, when it is found that a potential defense witness can offer testimony which is clearly exculpatory and essential to the defense case and when the government has no strong interest in withholding use immunity, the court should grant judicial immunity to the witness in order to vindicate the defendant's constitutional right to a fair trial. The record on this appeal establishes that either of these theories may be available to the defense.

We will therefore vacate the sentences of Glen, Rieara and Georges and remand to the district court for an evidentiary hearing and further proceedings not inconsistent with this opinion.[16]

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16. As pointed out at pp. 5-6 and note 4, *supra*, the due process/immunity theories have no application to the appeal of Elvis Smith (No. 79-1214). We therefore affirm his conviction.

Supreme Court, U. S.
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No. 79-1229

In the Supreme Court of the United States

OCTOBER TERM, 1979

GERALD N. KLAUBER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 611 F. 2d 512.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1979. A petition for rehearing was denied on January 9, 1980 (Pet. App. 16a-17a). The petition for a writ of certiorari was filed on February 7, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court's refusal to order the government to grant immunity to a prospective defense witness denied petitioner a fair trial.

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted of mail fraud, in violation of 18 U.S.C. 1341, and racketeering, in violation of 18 U.S.C. 1962(c). He was sentenced to concurrent terms of five years' imprisonment on each count. The court of appeals affirmed (Pet. App. 1a-16a).

The evidence at trial showed that petitioner, an attorney, engaged in a scheme to defraud insurance companies through the submission of false information concerning disability and medical expenses in support of personal injury claims. Petitioner used inflated medical bills and exaggerated medical reports to obtain settlements for his clients from insurance carriers (Pet. App. 2a).

Thirteen of petitioner's former clients testified that they had been injured in automobile accidents and that petitioner settled their claims. All confirmed that their medical bills were false and that the number of reported medical treatments was substantially inflated (Tr. 136-176, 180-205, 314-344, 440-500, 500-523, 524-570, 571-617, 617-645, 744-752, 722-795, 815-861, 1367-1389, 1496-1520). In addition, four doctors admitted furnishing petitioner falsified medical bills and reports (Tr. 1972-1974).

At trial, petitioner asserted that he wished to call Michael Simons to the witness stand but could not do so because Simons would claim his Fifth Amendment privilege as to every substantive question.[1] Petitioner

[1]Petitioner's counsel stated that he had spoken to Simons' counsel and was informed that Simons would assert his Fifth Amendment privilege.

therefore requested that the trial court require the government to grant use immunity to Simons to testify in petitioner's behalf. Simons, a former associate in petitioner's law firm, had testified under a grant of use immunity before the grand jury that indicted petitioner. Petitioner's offer of proof consisted of three points: (1) that Simons did not discuss inflated medical bills with one of the physicians who testified for the government; (2) that certain law firm records had been destroyed to conserve space, not to conceal incriminating evidence; and (3) that petitioner had nothing to do with the destruction of the firm's records (Pet. App. 3a). Petitioner's request to compel the government to grant Simons use immunity was denied by the district court.

ARGUMENT

Petitioner contends (Pet. 9-19) that he was denied a fair trial by the district court's refusal to compel the government to grant immunity to Simons as a prospective witness. As the court of appeals noted, however, it is doubtful whether this issue is properly presented in this case (Pet. App. 9a). The evidence petitioner wished to adduce may well have been available to him without a grant of immunity through use of Simons' grand jury testimony—which petitioner did not seek to obtain or introduce at trial.[2]

[2]As the court of appeals observed (Pet. App. 5a-9a), petitioner did not offer Simons' grand jury testimony as substantive evidence under Fed. R. Evid. 804(b)(1). That rule provides that if a declarant is unavailable as a witness, testimony that he has given as a witness at another hearing is not excluded by the hearsay rule if the party against whom the testimony is offered had an opportunity to develop the testimony by direct, cross, or redirect examination. Since the government examined Simons at the time he testified before the grand jury, petitioner may have been able to offer that testimony as

In any event, it is well settled that a criminal defendant has no general right to obtain immunity for defense witnesses. See, *e.g.*, *United States* v. *Lang*, 589 F. 2d 92, 95-96 (2d Cir. 1978); *In re Kilgo*, 484 F. 2d 1215, 1222 (4th Cir. 1973). The federal courts have repeatedly recognized that authority to apply for immunity is vested solely in the prosecutor. *United States* v. *Benveniste*, 564 F. 2d 335, 339 n.4 (9th Cir. 1977); *United States* v. *Housand*, 550 F. 2d 818, 824 (2d Cir. 1977); *In re Daley*, 549 F. 2d 469, 479-480 (7th Cir.), cert. denied, 434 U.S. 829 (1977); *United States* v. *Graham*, 548 F. 2d 1302, 1315 (8th Cir. 1977); *United States* v. *Allstate Mortgage Corp.*, 507 F. 2d 492, 494-495 (7th Cir. 1974), cert. denied, 421 U.S. 999 (1975); *In re Kilgo, supra; Earl* v. *United States*, 361 F. 2d 531, 534 (D.C. Cir. 1966), cert. denied, 388 U.S. 921 (1967).

We recognize that several courts have suggested that under special circumstances a district court may impose sanctions for failure of the government to respond affirmatively to a request that a prospective defense witness be immunized.[3] See *United States* v. *Morrison*,

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substantive evidence at trial. Fed. R. Evid. 804(a)(2) specifically provides that "unavailability" includes cases in which the declarant is exempted from testifying on the ground of privilege. Petitioner at no time made any effort to obtain or introduce Simons' grand jury testimony.

[3]In addition to the possibility of sanctions, the Third Circuit has suggested the existence of an inherent power in the district court to immunize witnesses in extraordinary situations. See *United States* v. *Herman*, 589 F. 2d 1191, 1204 (3d Cir. 1978). While we submit that this conclusion is inconsistent with longstanding principles of separation of powers (see *In re Daley*, *supra*, 549 F. 2d at 479), that question is not presented here. Even if such a power exists, petitioner does not claim that the circumstances here required its exercise. Indeed, in the district court, petitioner's counsel expressly disavowed

535 F. 2d 223 (3d Cir.), cert. denied, 429 U.S. 824 (1976); *United States* v. *De Palma*, 476 F. Supp. 775, 778 (S.D. N.Y. 1979). Even if this view accurately embodies applicable law, however, the circumstances necessary for imposition of sanctions were not present in this case.

In *United States* v. *Morrison*, *supra*, an otherwise willing defense witness was driven to invoke her Fifth Amendment privilege by prosecutorial misconduct. The

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reliance on the court's power in that regard, arguing only that the court should order the government to seek immunity (Tr. 1919-1921).

The Third Circuit's recent decision in *Government of the Virgin Islands* v. *Smith*, No. 79-1212 (Feb. 5, 1980), does not conflict with the decision of the court of appeals in this case. The Third Circuit held in *Smith* that "[w]hen the court finds prosecutorial misconduct by the government's deliberate intent to disrupt the factfinding process, it should order the government to grant statutory immunity to the defense witness * * *" (slip op. 20). In the present case, the court of appeals specifically found that "[t]he government's unwillingness to immunize the witness * * * [did] not amount to bad faith, nor did it lead to unfairness to Klauber" (Pet. App. 14a). The Third Circuit's decision in *Smith* also held that "when it is found that a potential defense witness can offer testimony which is clearly exculpatory and essential to the defense case and when the government has no strong interest in withholding use immunity, the court should grant judicial immunity * * *" (slip op. 20). The court added that "[i]mmunity will be denied if the proffered testimony is found to be ambiguous, not clearly exculpatory, cumulative or if it is found to relate only to the credibility of the government's witnesses" (slip op. 16). In the present case, the court of appeals found that the evidence proffered by petitioner was cumulative and not clearly exculpatory. There is thus no conflict with *Smith*, as the Third Circuit stressed: "The standards formulated here take into account the objections to judicial immunity which have recently been expressed in the opinions of other courts of appeals. For example, in *United States* v. *Klauber*, * * * the Fourth Circuit * * * noted that the defense witness had not appeared in court, that there was no showing that the witness would be able to claim the fifth amendment privilege and that the defendant had made no showing as to what the content of the proffered testimony would be—let alone whether it would be exculpatory. * * * *Klauber* * * * [is] not inconsistent with the result reached in this opinion." Slip op. 16 n.13.

court of appeals found that the defendant's right to a fair trial had been denied by the prosecutor's misconduct. The court held that the government must request use immunity for the witness if she refused to testify on remand, and that in the absence of such a request by the government the district court should enter a judgment of acquittal. See 535 F. 2d at 229. In this case there is no suggestion that Simons' refusal to testify resulted from prosecutorial misconduct, and there was thus no occasion for the special remedy fashioned in *Morrison*.

Petitioner does not argue to the contrary, but instead relies on the district court's decision in *United States* v. *De Palma*, *supra*. In *De Palma*, the government chose to obtain immunity for two of four individuals involved in a securities fraud, denying a defense request that the other two be given immunity. The district judge found that it was a denial of due process for the government to pick and choose among those persons directly involved in the crime who could shed light on the culpability of the defendant. The court therefore held that the testimony of the two witnesses the government proposed to call should not be received unless the government requested immunity for the other two witnesses. The decision of the district court in *De Palma* has been appealed by the government, No. 79-1315 (2d Cir.).

The approach of the district court in *De Palma* does not conflict with that of the court of appeals here. The only immunized witness for the government whose testimony related to that which Simons could provide was Roger Powell, another associate in petitioner's law firm. Powell's testimony related to the alleged destruction of law firm records (Tr. 1487-1488). The court below correctly pointed out that this situation was not akin to *De Palma*, where both the government's immunized witnesses and

the prospective defense witnesses were centrally involved in the charged offense and could provide essential evidence (Pet. App. 13a):

> [Powell's] involvement was peripheral, not central, to the matters charged, as was the case with the witnesses in *De Palma*. Simons' testimony would similarly go to secondary, not primary matters. * * *
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> Other witnesses, two * * * former associates, Samuel Blibourn and Paul Gibbons, testified that Powell was a liar. The essential thrust of the Simons testimony which [petitioner] sought to obtain through use immunity was, therefore, cumulative.

Finally, it must be noted that the district court in *De Palma* did not rule that the witness whose testimony was sought by the defendant had to be immunized. Rather, the court held that the testimony of an immunized government witness could not be received. Since petitioner did not seek to condition the receipt of Powell's testimony on a grant of immunity to Simons, he failed to preserve this point for review (Pet. App. 12a-13a & n.12).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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